BRIEF IN SUPPORT OF PETITION.

OPINIONS BELOW.

The opinion of the Board (Richard Archbold case, R. 25-30; Adrian Archbold case, R. 23-28; John Archbold case, R. 22-27; Archbold van Beuren case, R. 25-30) was promulgated Dec. 22, 1939 and is reported in 40 B. T. A. 1238. The *per curiam* opinion of the Circuit Court of Appeals, 115 F. (2) 1005, was rendered December 2, 1940, and appears at R. 43.

STATEMENT OF FACTS.

The pertinent facts are adequately stated in the foregoing petition at pages 2, 3, 4 thereof.

STATUTE INVOLVED.

The relevant provisions of the Revenue Act of 1932 are set forth in full in the petition on page 2 thereof.

SPECIFICATION OF ERRORS.

The errors which Petitioners will urge, if the writs of certiorari be granted, are that the Circuit Court of Appeals for the Second Circuit erred:

1. In holding that these cases were ruled by the decision of this Court in the case of *Helvering v. Hallock*, 309 U. S. 106 (1940).

2. In determining that the securities which Petitioners sold in 1933, which they had received from trustees under trusts created by their grandparents prior to January 1, 1921, in which trusts petitioners had only contingent remainders which did not vest until they reached the age of twenty-one, were acquired by petitioners within the intendment of Section 113 (a) (4) of the Revenue Act of 1932, at the same time the securities were acquired by the trustees.

3. In holding that the proper basis for determining gain or loss upon the sales by Petitioners in 1933 of securities received by them under deeds of trust created by their grandparents prior to January 1, 1921, was the basis in the hands of the trustees.

4. In holding that the proper basis for determining gain or loss upon the sales by Petitioners in 1933 of securities received by them from the trustees under deeds of trust created by their grandparents prior to January 1, 1921, was not the value of the said securities when received by them upon their respective arrivals at the age of twenty-one.

5. In confirming the orders of the Board and in failing to reverse such orders.

ARGUMENT.

The Circuit Court of Appeals for the Second Circuit has rendered decisions in the instant cases in conflict with the Circuit Court of Appeals for the Fourth Circuit in *Reynolds v. Commissioner,* 114 F. (2d) 804, certiorari granted February 10, 1941.

After first having held that the taxpayer in the *Reynolds* case had only a contingent interest under the will of the testator, the Court in that case continued:

> "The inquiry in its final aspect is whether the date of acquisition shown by the legatee of a contingent remainder within the meaning of Section 113 (a) (5) of the Act of 1934 is the date of the testator's death or the date of the event upon which the remainder becomes vested."

The Court then held as follows:

> "This basis is the fair market value of the securities at the time they were distributed by the trustee to the taxpayer, when the interest of the taxpayer therein that, up to that time, had been contingent, became absolute and vested."

That the decisions in the instant cases are in conflict with that of the *Reynolds* case appears clearly in the following statement of the Second Circuit in the case of *Van Vranken v. Helvering,* 115 F. (2d) 709, 710 (December 2, 1940):

> "Were it not for the change in the attitude of the Supreme Court towards the common law distinction between contingent and vested remainders (Helvering v. Hallock, 309 U. S. 106; 60 S. Ct. 444; 84 L. E. 604; 125 A. L. R. 1368), we should therefore find it difficult to escape the force of the reasoning in Reynolds v. Commissioner, supra (114 F. (2d) 804)."

And by the statement of the Second Circuit in the instant cases:

> "This case presents no other questions than those decided in Van Vranken v. Helvering handed down herewith. It is true that here the trusts were not testamentary but had been set up by a deed of the taxpayers' ancestor executed in 1910. The relevant statute is not 113 (a) (5) of the Act of 1934, but 113 (a) (4) of the Act of 1932, and that has remained unchanged from the time of its first enactment in 1921. This might have required some separate consideration if we had depended upon the changes in Section 113 (a) (5) in reaching our conclusion; but we did not. Again there was in 1933 no regulation interpreting Section 113 (a) (4), but that too is not important for we have not depended upon the regulations of 1934 in our reasoning in Van Vranken v. Helvering. Our discussion there can therefore serve here."

We therefore respectfully urge that this Court allow the Writs.

Respectfully submitted,

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Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 792

RICHARD ARCHBOLD, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

No. 793

ADRIAN ARCHBOLD, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

No. 794

JOHN ARCHBOLD, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

No. 795

ARCHBOLD VAN BEUREN, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

The questions presented relate to the proper basis, under Section 113 (a) (4) of the Revenue

Act of 1932, for determining gain or loss upon sales made by petitioners in 1933 of securities which they received, on reaching the age of 21, under the provisions of an *inter vivos* trust created before 1921. Two types of securities are involved: (1) securities forming part of the original corpus of the trust, and (2) securities purchased by the *inter vivos* trustees. Section 113 (a) provides that the basis for property shall be cost, except as otherwise provided in its subsections. Subsection 4 of Section 113 (a) provides that the basis for property "acquired by gift or transfer in trust" before 1921 "shall be the fair market value of such property at the time of such acquisition." The Government contends that securities of the first type above enumerated were "acquired" by petitioners when they were transferred to the *inter vivos* trustees, and that securities of the second type, if they fall within subsection (4) at all and are not governed by the general cost provision of Section 113 (a), were "acquired" by petitioners when they were purchased by the trustees. Petitioners contend that they "acquired" all of the securities at the time of delivery to them by the trustees.

Similar questions, involving the basis of property acquired through testamentary trusts, under Section 113 (a) (5) of the Revenue Acts of 1934 and 1936, are awaiting argument before this Court in *Helvering* v. *Reynolds,* 114 F. (2d) 804 (C. C. A. 4th), certiorari granted, No. 684, this Term, and in *Cary* v. *Helvering,* and associated cases, 116 F. (2d)

800 (C. C. A. 2d), certiorari granted, Nos. 734–737, this Term. The provisions of Section 113 (a) (5) of the 1934 and 1936 Acts, dealing with property acquired through testamentary trusts, parallel the provisions of Section 113 (a) (4) of the 1932 Act, dealing with property acquired through an *inter vivos* trust. We therefore do not oppose the granting of writs of certiorari in the present cases.

However, other related questions have already been argued before this Court in *Maguire* v. *Helvering,* No. 346, this Term, and *Helvering* v. *Gambrill,* and associated cases, Nos. 472–475, this Term, and it may be that the decisions in those cases will substantially dispose of the questions in the present cases and in the *Reynolds* and *Cary* cases.

If the outcome of the present cases should depend, contrary to the Government's contention, upon whether the interests of petitioners under the trust were "vested" or "contingent," we wish to reserve the right to contend that the interests were vested rather than contingent.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

MARCH, 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1941